Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MOORE,

Petitioner,

v.

DANIEL L. SANDERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question that is currently pending before the Court in *Baldwin v. Reese*, No. 02-964, which was argued on December 8, 2003.

For the purpose of the federal habeas corpus exhaustion requirement, does a state prisoner fairly present his federal claim to the state's highest court when—in that court—he neither cites to the federal Constitution nor cites to at least one authority that has decided the claim on a federal basis?

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner: Leslie W. Ryder was the Respondent-Appellee below. Mr. Ryder was the Superintendent of the Monroe Correctional Complex when this matter was originally filed. Robert Moore is Mr. Ryder's successor and the Superintendent of the Monroe Correctional Complex.

Respondent: Daniel L. Sanders was the Petitioner-Appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of petitioner Robert Moore, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 342 F.3d 991, and is attached to this petition at Appendix 1a-22a. The District Court's opinion is not reported and is attached to this petition at Appendix 27a-38a.

JURISDICTION

The Court of Appeals' opinion was filed on September 4, 2003. The State timely filed a petition for rehearing and suggestion for rehearing en banc. By order filed October 15, 2003, the Court denied that petition. A copy of that order is attached at Appendix 23a. Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2254 provides, in part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; * * *

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT

Sanders was convicted in state court of first degree child molestation. His conviction was upheld by the Washington Court of Appeals in an unpublished opinion. The Washington Supreme Court denied Sanders' petition to review the Court of Appeals' decision without comment.

Sanders filed a pro se habeas corpus petition in the United States District Court for the Western District of Washington, naming the Superintendent of the correctional facility where he was incarcerated (the State). The State moved to dismiss Sanders' habeas petition, asserting that Sanders had failed to properly exhaust any of his nine habeas claims, as they were either not presented in any form to the Washington Supreme Court, or, if presented, were not presented as specific federal constitutional violations. The District Court dismissed the petition concluding that all but one of his claims were procedurally barred because they were unexhausted. Sanders' due process claim, which was exhausted, failed on the merits. App. 34a-37a. Sanders filed a notice of appeal, and the District Court granted his request for a certificate of appealability on two issues: (1) whether the state court of appeals' decision to deny his due process claims was contrary to federal law or not based on a reasonable

determination of the facts; and (2) whether he failed to properly exhaust the other issues raised in his petition and is now procedurally barred from having those claims considered.

The Ninth Circuit reversed the district court holding that Sanders' ineffective assistance of counsel claim was properly exhausted. Although Sanders cited to both the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984) to support his ineffective assistance of counsel claim in the Washington Court of Appeals, his pro se petition to the Washington Supreme Court cited to neither. Nor did it cite to any other authority resolving that claim on a federal basis. The only constitutional provision Sanders cited in connection with his ineffective assistance claim was article I, section 22, which is the Washington counterpart of the federal Sixth Amendment. Despite these facts the Ninth Circuit held that Sanders had "presented his federal ineffective assistance of counsel claim to the Washington Supreme Court in such a manner that the court had a 'fair opportunity' to address his claim." App. 21a.

The Ninth Circuit reasoned that Sanders had fairly presented his claim because the petition "used the phrase 'ineffective assistance of counsel' three times." App. 20a. Although one of these mentions was followed by a reference to article I, section 22 of the Washington Constitution, the court concluded that there was "nothing to suggest that Sanders—a pro se petitioner—meant to allege specifically and exclusively a violation of his state constitutional rights." *Id.* The court also relied on the fact that

Sanders' reply brief cited both the Sixth Amendment and *Strickland*. App. 21a.

Since the Ninth Circuit concluded that Sanders had exhausted his ineffective assistance of counsel claim, it remanded the case to the District Court to conduct an evidentiary hearing and reach he merits. The court declined to reach any of the other issues raised in Sanders' appeal.

The State timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied. App. 23a.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because there is substantial confusion among the circuits about how to determine whether a habeas corpus petitioner has exhausted his claims in state court. The Court is currently addressing this confusion in *Baldwin v. Reese*, No. 02-964, which was argued December 8, 2003.

A. This Case Presents The Same Question Pending Before The Court in *Baldwin v. Reese*

In *Baldwin* the District Court dismissed Reese's habeas corpus petition because he failed to exhaust his ineffective assistance of counsel claims in the state's highest court. The Ninth Circuit reversed. In his petition to the Oregon Supreme Court "Reese cited the federal constitution in the argument section . . . but did so explicitly to support only claims other than the ineffective assistance of appellate counsel." *Reese v. Baldwin*, 282 F.3d 1184, 1193 (9th Cir. 2003). Despite this fact, the Ninth

Circuit concluded that Reese had fairly presented his ineffective assistance of counsel claim to the Oregon Supreme Court. Since the claim had been properly raised in the lower Oregon courts, the Ninth Circuit reasoned that "it must be presumed that, before deciding to deny discretionary review, the Oregon Supreme Court reviewed the [lower] court decision that should have alerted the court to the federal nature of Reese's claim." *Id.* at 1194.

In both *Baldwin* and this case the petitioners failed to include in their petitions any citations to the federal Constitution or to at least one authority that decided their claims on a federal basis. Despite this fact, the Ninth Circuit ruled that the claims were fairly presented to the state's highest court. The question presented to this Court in *Baldwin* is: "Does a state prisoner 'alert' the State's highest court that he is raising a federal claim when—in that court—he neither cites a federal constitution nor cites at least one authority that has decided the claim on a federal basis?" Brief For Petitioner, *Baldwin v. Reese*, No. 02-964, at i. This case presents the same question.

B. There Is Substantial Confusion Among The Federal Circuits About How To Determine Whether A Habeas Corpus Petitioner Has Fairly Presented His Claim In State Court

There is substantial confusion among the federal circuits about how to determine whether a habeas corpus petitioner has fairly presented his claim federal claim to the state's highest court. Although this Court has imposed an explicit requirement that state prisoners "fairly present"

their federal claims first in state courts before they can be raised in federal habeas corpus, the federal courts have treated that requirement in very different ways. The approaches followed by the majority of circuits have not been faithful to this Court's recent pronouncements.

1. To Meet The Exhaustion Requirement A Petitioner Must Fairly Present His Federal Claim to the State's Highest Court

Under this Court's decisions, a federal habeas corpus petitioner must fairly present his claims to the state's highest court. In *Duncan v. Henry*, 513 U.S. 364 (1995), the Ninth Circuit concluded that Henry had "fairly presented the substance of his federal claim to the state courts," thereby satisfying the exhaustion/procedural default requirements of § 2254. *Henry v. Estelle*, 33 F.3d 1037, 1040–41 (9th Cir. 1993). The Ninth Circuit reached this conclusion because, although not labeling his state court claims in federal terms, Henry had made essentially the same arguments before the state court as he made in the federal court in support of his federal claims. *Id.*

In *Duncan* this Court rejected the Ninth Circuit's approach. This Court did not characterize the question as whether Henry had fairly presented the *substance* of his federal claim to state court; rather, it required that *the federal claim* itself be fairly presented. According to the Court, "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth

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Amendment, *he must say so, not only in federal court, but in state court.*" *Duncan*, 513 U.S. at 365 (emphasis added).

The Court concluded that Henry had not satisfied this requirement because he "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Id.*

Four years after *Duncan*, this Court extended the "fair presentment of federal claims" requirement to include review by the State's highest appellate court, even where that review is discretionary. In *O'Sullivan v. Boerckel*, 526 U.S. 838, 848–49 (1999), this Court held that "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

2. The Federal Circuits Apply Varying And Inconsistent Tests In Determining Whether A State Prisoner Has "Fairly Presented" A Federal Claim In State Courts

There is substantial confusion among the federal circuits about how to apply *Duncan* and *O'Sullivan*. There are three different approaches.

a. The "Strict Presentation" Test

To satisfy the fair presentation requirement in the Fourth and Eleventh Circuits a state prisoner must include in his filings in state court a reference to the federal constitution or an authority that has decided the claim on a federal basis. *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000), *cert. denied*, 531 U.S. 1193 (2001) (prisoner's habeas claim that jury instruction violated federal law was not exhausted where prisoner, on direct appeal, neither cited nor referred to federal law); *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002) ("In light of *Duncan*, we agree with the district court that Isaacs did not 'fairly present' to the state court a [federal claim where no] federal cases were cited, and no language was used by Isaacs which would have alerted the Georgia Supreme Court to the fact that Isaacs was asserting a federal constitutional claim, separate and independent from his [state] claim.").[1]

This approach most closely follows *Duncan* and *O'Sullivan* because it requires the state prisoner to inform the state's highest court that federal claims are being raised.

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[1] The Eleventh Circuit, before *Duncan*, applied the four-factor test from *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir., 1982) in analyzing exhaustion questions. *See Watson v Dugger* 945 F.2d 367, 370 (11th Cir. 1991). In its post-*Duncan* decision in *Isaacs*, however, the court did not cite Watson nor employ the *Daye* test in concluding that the prisoner there had not exhausted his federal claim in state court. Thus, that circuit appears to have recognized the change required by *Duncan* and modified its test accordingly.

b. The "Whole Record Review" Test

The First, Fifth, and Ninth circuits do not confine their inquiry to the pleadings filed by the state prisoner in the State's highest appellate court, but will consider lower court filings and documents as well to determine if the federal claim was identified there. If, on review, the court can determine that the petitioner raised the federal claim somewhere in the state's lower courts, it may conclude that the state's highest appellate court was "alerted" to the federal nature of the state prisoner's claim on appeal. *Barresi v. Maloney*, 296 F.3d 48, 52 (1st Cir. 2002) (court will consider "pleading and filings submitted by a habeas petitioner to lower state courts * * * [as] 'a backdrop against which his later filings [must] be viewed'") (citation omitted); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (in determining whether prisoner had presented the "substance of the federal habeas claim to the highest state court" court will review prisoner's "state habeas application" in the state trial court, including attachments to the application); *Reese v. Baldwin*, 282 F.3d 1184 (9th Cir. 2002) (state prisoner "alerted" state supreme court to federal nature of his claim, where it was clear that the state post-conviction trial court had resolved the claim below citing federal authority).

c. The "Substance Of The Claim" Test

The Second, Third, Seventh, and Eighth Circuits confine their analysis to the pleadings filed by the state prisoner in the state's highest appellate

court. In these circuits a state prisoner may present the federal claims by (a) citing federal cases employing constitutional analysis, (b) citing state cases employing constitutional analysis in like fact situations, (c) asserting the claim in terms so particular as to call to mind a specific right protected by the Constitution, or (d) alleging a pattern of facts that is well within the mainstream of constitutional litigation. *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984), *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir. 1999) (applying *Daye v. Attorney General*);*Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001) (applying *Daye v. Attorney General*); *Barrett v. Acevedo*, 143 F.3d 449, 453–54 (8th Cir. 1998), *on reh'g.*, 169 F.3d 1155 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 846 (1999) (court states that "fair presentment" requires petitioner "to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent constitutional issue" in the state court, while also stating that it is only the "substance of his federal claim that must be fairly presented to the state court.").

Thus, the federal circuits are badly divided on the proper approach to determine whether a claim has been fairly presented in state court. We expect that this Court will provide direction to the federal courts in its decision in *Baldwin v. Reese*. Since this case presents the same question, the Court should also grant the writ in this case.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant the petition for a writ of certiorari.

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January 13, 2004

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

DANIEL L. SANDERS,	)	No. 01-35675
	)	
Petitioner-Appellant,	)	DC. No.
	)	CV-00-05564-RJB
v.	)	
	)	OPINION
LESLIE RYDER,	)	
	)	
Respondent-Appellee.	)	

Appeal from the United States District Court for the Western District of Washington

Robert J. Bryan, District Judge, Presiding

Argued and Submitted

March 3, 2003 -- Seattle, Washington.

Filed September 4, 2003.

Before: Stephen Reinhardt, William A. Fletcher, and Ronald M. Gould, Circuit Judges.

Opinion by Judge William A. Fletcher

Michael C. Kahrs, Seattle, Washington, for the petitioner- appellant.

Gregory J. Rosen, Attorney General's Office, Olympia, Washington, for the respondent-appellee.

OPINION

W. FLETCHER, Circuit Judge:

Daniel Sanders was convicted of child molestation in Washington state court. After appealing unsuccessfully in state court, Sanders filed a federal habeas petition. The magistrate judge ruled that some of Sanders's claims had not been exhausted in state court, and that the Washington courts' rulings on the other claims were not contrary to and did not involve an unreasonable application of clearly established federal law as determined by the Supreme Court. The district court adopted the magistrate judge's ruling. Because we hold that Sanders exhausted his federal ineffective assistance of trial counsel claim in state court, we reverse.

I. Background

Petitioner-appellant Daniel Sanders maintains that he is innocent of the charge of child molestation of which he was convicted and that he received a woefully unfair trial in Washington state court. During late May and early June of 1997, Sanders went to stay with Patti Kelley, his ex-girlfriend, so that he could spend some time with their fourteen-year-old son Gabe. Kelley also lived with her three-year-old son Tyler, who was not Sanders's child. Both Sanders and Kelley were drug users. A few days into Sanders's visit, Kelley went to police and accused Sanders of sexually assaulting

Tyler.

According to Sanders, Kelley fabricated the accusation to retaliate against Sanders after a fight. Sanders says that Tyler had "gotten into" Kelley's stash of methamphetamine while Kelley slept. Sanders, concerned about Tyler's welfare, told Kelley that he would call Child Protective Services if she did not take better care of the children. Sanders claims that Kelley, in response, contacted police and made a false report that Sanders had masturbated on Tyler. Sanders was charged with Child Molestation in the First Degree.

At Sanders's trial, Kelley testified that Tyler had told her that Sanders's penis had "spit in his face." Tyler himself did not testify. The judge found Tyler incompetent because, during a pretrial hearing, Tyler said "My mom told me to say these things about [Sanders]," and he would not, or could not, identify Sanders in the courtroom. Although Kelley said she had put Tyler's clothes and the washcloth used to clean him in a bag for police, no semen was found on any of the items. Tyler was examined the day after the alleged incident, and though Kelley said she had not bathed him, no semen was found on him. The prosecution's only physical evidence in the case was semen found on the carpet of the room where Sanders had been staying and where he admitted that he had masturbated.

Sanders maintained that he was innocent and that Kelley had fabricated the charges against him and had instructed her young son Tyler to lie. In his habeas petition, he states that he asked his attorney Thomas Ladouceur, who had been appointed by the state court, to call various witnesses in his defense.

In support of his claim that Kelley had fabricated the charge following a fight about Kelley's drugs, Sanders identified a neighbor who had witnessed the fight. Ladouceur did not call or interview the neighbor as a potential witness. Kelley testified that she had not fought with Sanders, and Ladouceur made no effort to impeach her testimony.

Sanders claims that Kelley had a history of threatening and making false charges. Sanders identified witnesses who would testify that Kelley, in the course of various disputes with Sanders, had frequently threatened to call the police and falsely report that he had committed crimes or violated his parole. Sanders identified witnesses who would testify that Kelley had a history of coaching her children and forcing them to lie. Ladouceur, however, did not call or interview any of these witnesses.

Sanders claims that Kelley had previously fabricated molestation charges against another man. According to Sanders, Kelley had a dispute in 1995 with a man nicknamed Grizzly about drug money. Kelley called the police and claimed that Grizzly had molested Gabe. Grizzly was convicted of the charges, but Gabe later told Sanders that Kelley had told him to make up the story. Sanders spoke with Grizzly and asked Ladouceur to interview him, but Ladouceur made no effort to investigate the prior incident involving Grizzly and Gabe.

Sanders also identified several potential character witnesses. Sanders claimed that, though he had a checkered past in some respects, he had never committed any violent or sexual crimes. He suggested that Ladouceur call witnesses to testify to

his good character. Ladouceur did not interview or call any such witnesses.

Finally, Sanders identified a disinterested third-party witness, Dee Ann Wren, who could establish an alibi. After his fight with Kelley, Sanders did not want to stay at her apartment any longer, and he began searching for a place to live. Sanders contacted Wren, whom he had never met before, and discussed the possibility of moving into Wren's house. During the time that Kelley claimed Sanders assaulted Tyler, Wren says that she and Sanders were on the telephone together. Wren says that she and Sanders were on the phone for a lengthy period while she asked him various questions to evaluate whether he would be a good tenant. Wren says that, over the telephone, she could hear Tyler coming into the room and that Sanders's several times had to interrupt the telephone conversation to scold Tyler and ask him to leave. After Sanders had been arrested, Wren contacted Ladouceur and offered to testify, but Ladouceur did not interview Wren or call her to testify.

Sanders states that he repeatedly contacted Ladouceur before trial and implored him to interview witnesses who would support his story. According to Sanders, Ladouceur made no attempt to investigate his claims. Sanders had some potential witnesses contact Ladouceur, but Ladouceur told them that their testimony was not needed. To the extent that Ladouceur gave any explanation for his tactics, he said that calling the other witnesses would be unwise because it would allow the prosecution to admit damaging evidence about Sanders's past. Damaging evidence about Sanders's past was admitted anyway,

however, since the judge ruled before trial that the prosecution could use certain prior convictions and Sanders's history of drug use to impeach his trial testimony.

Ladouceur did not call any of Sanders's proposed witnesses. Other than Sanders himself, Ladouceur called no witnesses at all. Ladouceur did not seek to call Tyler or to inform the jury that Tyler had previously testified that his mother had "told me to say these things about [Sanders]." Ladouceur's primary defense was to suggest that Sanders had splashed water on Tyler's face, and that Tyler had misinterpreted harmless playing as molestation. Ladouceur also emphasized that Sanders had been alone with Tyler several times, apparently to suggest that if Sanders wanted to assault Tyler, he would have done it sooner. Sanders became so frustrated with Ladouceur's performance that he asked the trial judge if he could have a new lawyer or proceed pro se, but the judge reminded Sanders that Ladouceur had legal expertise and that he might have sound tactical reasons for his decisions that Sanders did not understand.

After about an hour of deliberation, the jury found Sanders guilty. Disgusted by Ladouceur's performance at trial, Sanders's family put together enough money to hire a private attorney, Mary Gaffney. With Gaffney's help, Sanders hoped to appeal his conviction and seek a new trial.

However, after the jury's verdict but before sentencing, the prosecutor threatened to bring new charges of perjury and witness tampering against Sanders. The basis of the perjury charge was the following exchange during the prosecutor's cross-examination of Sanders at trial.

> Prosecutor: [In addition to other drug charges already mentioned,] you have also been involved with drugs in the past, is that correct?
>
> Sanders: Yes, I have.
>
> Prosecutor: On numerous occasions?
>
> Sanders: [inaudible.]
>
> Prosecutor: Numerous, Mr. Sanders?
>
> Sanders: There's been a couple, yes.
>
> Prosecutor: Only a couple? That's your testimony--only a couple?
>
> Sanders: There's been--
>
> Prosecutor: Am I correct that it's been numerous?
>
> Sanders: Yes. Yes.

The prosecutor apparently intended to argue that Sanders's initial response that he had been involved with drugs on "a couple" occasions was perjurious because it inadequately portrayed the extent of his previous drug problem. The basis of the witness tampering charge was Kelley's claim that Sanders, during a court proceeding, had turned around and mouthed "I'll get you" to her. But according to Sanders, he had actually mouthed "I love you" to his sister. Sanders and Gaffney believed

that the additional charges were baseless, but the prosecutor threatened to file them and let a jury decide.

The prosecutor also threatened to seek an upward departure from the usual sentencing range for child molestation. The prosecutor said that Sanders was "looking at an exceptional sentence that's going to exceed maybe his life expectancy." But the prosecutor did offer Sanders a deal of sorts. The prosecutor said that if Sanders would waive his right to appeal and his right to seek a new trial, she would not pursue the additional charges, and she would recommend a sentence of only 108 months in prison.

Sanders maintained that he was innocent, that his trial had been a sham, and that Ladouceur had entirely failed to present a meaningful defense. He wanted the chance to vindicate himself on appeal. But Sanders also did not want to subject himself to the very lengthy prison term that could result from additional charges and an exceptional sentence. At a sentencing hearing, Sanders was presented with his options.

> Gaffney [Sanders's attorney]: Mr. Sanders, do you have any questions--
>
> Sanders: Yeah, I've got a lot of them.
>
> Court: Okay.
>
> Sanders: How does the Court of Appeals work, sir? Do you know?
>
> Court: Never been on it.
>
> Sanders: It says here, "Voluntarily and without"-- what is it-- "threatening"--where

the hell part is that in there?

Gaffney: "No threats or promises of any kind" other than that they're recommending the 108 [months].

Sanders: Well, that's a threat.

Court: Well, that's not--that's not--this is--what they're saying is this is what has been agreed to. If you do this, the prosecution will do that.

Sanders: Otherwise known as blackmail or threat or--

Court: Well, if you consider that to be a threat, fine, I understand what you're saying. And that's what the exception is. No threats or promises other than what's set forth in writing....

Prosecutor: And let's put him on record. The State's ability to make a recommendation is not a threat. I understand the defendant thinking it's such. But we're free to recommend any sentence we want, and we're--this is for his benefit, not your benefit.

Sanders: But the judge always goes with what you say, always.

Prosecutor: And we're agreeing to recommend 108 instead of a lot more. So that's what the judge is asking you.

Sanders: And I want to sign this, but I don't want to give up my waiver of appeals.

Court: Well, you can't have both is what they're saying. If you sign this-- that's what the State--it's called a bargain. It's called an

agreement.

Sanders: A bargain? I didn't get--I didn't get nothin'.

. . . .

Prosecutor: [H]is attorney is recommending that he [take the deal]. So the judge does not have all day, and neither does Ms. Gaffney, and so the time is now to answer the question.

. . . .

Prosecutor: This is our bargain. If this bargain does not go through, then I'm free to do whatever I feel is appropriate.

. . . . .

Gaffney: And I--just for the record, I told my client--he--only he can make this decision, no one can make it for him. It has to be his decision. I clearly don't want--

Sanders: I don't want to--[inaudible].

Gaffney:--my client to feel he's forced into it, and I don't want him to say, Well, I shouldn't have done it and my attorney told me to do it. Only you can decide. It's your life.

Court: That's right.

Sanders: Common sense tells me to take it and stuff, but I want my rights to appeal. How come I can't have that?

Court: Well, it doesn't--

Sanders: Why can't I have it?

Court: We aren't saving anything--the State's not saving anything by doing this. You're not

giving up anything. This is a--if you had a right to appeal plus accept this, what good does it do the State? How does it save them any time? How does it save the county any money? You're not--you're not getting something for nothing. Otherwise, they want to make sure they can give--throw the book at you.

Gaffney: I would anticipate, I don't know, an appeal could go anywhere 50 to 100 hours.

Court: Oh, yeah, absolutely.

Gaffney: So I think part of the State's position is the time that would be involved in appealing, because--and the resources, obviously. But only you can decide, Dan, and I clearly don't want you to go out and say I made you do this or I forced you to do it.

Sanders: Shhh.

Gaffney: I--only you can decide. It's your life.

Sanders: I don't know. I mean, I should, I know I should, but I--I don't know. I'm telling you, Judge, I don't know.

Court: I can't say anything one way or the other,

Mr. Sanders, I can't do that. You have the advice of your attorney. You can refer to your attorney for that, and that's why you have attorneys.

Gaffney: Of course, I have advised him on what I think would be his best position, but of course I--

Sanders: Do I have to do this right now--

. . . .

Court: Well, I don't know how long the offer's open for.

Prosecutor: Yes, right now.

Gaffney: I'm unavailable this afternoon.

Prosecutor: We've been having this discussion for weeks.

Sanders: Oh, my God.

. . . .

Sanders: How much is this 108 months?

Gaffney: It's nine years....

Sanders: Pff. I can't believe that.

. . . .

Sanders: Damn it, man, I know better than to do this.

Prosecutor: Mr. Sanders, statements like that and the judge won't accept your waiver, so you need to either do it or not do it. You've already said you thought you should, and then you said what you just said, so you need to go one way or another here.

. . . .

Gaffney: [I]f you don't sign that, then we would still be arguing the motion for the new trial and we'd be still arguing the appeal right, and then she would ask for the new charges and the exceptional. And that's basically what we have to decide.

Sanders: And that's a hell of a lot more time.

Gaffney: See, and--

Sanders: My sister'd put up $3,000 to get a retrial--

Gaffney: That's not--

Sanders: Well, damn, you don't seem to understand, I--

Gaffney: Okay--

Sanders:--have been shot down and shot down and shot down and shot down. I had a lot for an attorney that came in here. I fired him halfway through court 'cause he didn't do a damn thing. I had witnesses to come in and everything, and here I'm getting pegged for this stuff.

Court: Mr. Sanders--

Deputy: We've got to go. We haven't got all day.

Court: That's it.

Deputy: So sign it or don't sign it, we have to leave.

Court: Yeah.

Sanders: God.

Gaffney: Only you can decide what to do, no one can tell you what to do, Dan. You need to tell the judge what you're doing, what you want to do. I see your signature, but I don't know, you don't seem like you want to--

Court: Mr. Sanders, before I even accept that, before I even look at that, I need to know whether you are signing that freely and

voluntarily. That's the whole key. Those are the magic words, freely and voluntarily, with knowledge.

. . . .

Sanders: I have no choice but to take it.

Court: Mr. Sanders, do you wish me to execute this document or not?

Sanders: I have no choice but to take it.

Court: Well, when you say no choice, that means it's not being done freely. If you're telling me that this is the best thing that you think you can get, that's different. But don't be telling me you have no choice. Everyone has a choice. Don't tell me that, because then I won't sign it. So I need to know from you.

Sanders: I don't want any more time, Judge.

Court: Okay. That's different.

Prosecutor: So the Court is finding that this is freely and voluntarily, knowingly--

Sanders: When am I gonna see you again?

Prosecutor:--intelligently made, and then I would ask him to say yes or no when you ask him that question.

Court: I will, I'll go through that. Mr. Sanders, is this being made, your signing this agreement, are you doing so knowingly, knowing what's contained in here, yes or no?

Sanders: Yeah.

Court: Yes. Are you doing so intelligently?

Sanders: Yeah.

Court: Are you doing so voluntarily?

Sanders: Yeah.

Court: Okay. Based upon that, and your knowing that you're giving up the right to an appeal--right, you know that you're giving up the right to appeal? Say yes for me.

Sanders: Yeah.

Court: Thank you. Then I will sign it based upon those statements that you have just made.

Sanders subsequently moved to withdraw his agreement to the sentencing deal on the basis that he was coerced into accepting it, but the trial judge denied his request. The judge said to Sanders: "You had a more informed decision than almost anyone else that I know of." Sanders admitted that he had had a troubled life and that he had struggled with drugs, but he insisted that he was innocent of the crime and that he had never committed any violent or sexual crime. The judge was unmoved: "This is something different from drugs but frankly it's not a quantum leap when you hang around with those types of people because you're one of those people."

Sanders appealed his conviction to the Washington Court of Appeals. He argued, among other things, that he had received ineffective assistance of counsel, that the prosecutor had committed misconduct, and that he had not knowingly and voluntarily waived his right to appeal. The Court of Appeals held that Sanders had knowingly and voluntarily waived his right to appeal in exchange for a favorable sentencing recommendation and the prosecutor's promise not to

pursue the additional charges. Because it held that he had waived his right to appeal, the Court of Appeals dismissed Sanders's other claims.

Sanders filed a pro se petition to the Washington State Supreme Court. He argued that he had not voluntarily waived his right to appeal, and that he should at least have some chance to have his claims heard. He said that he had been denied due process of law and that he had received ineffective assistance of counsel. The Washington State Supreme Court summarily denied his petition without comment.

In 2000, Sanders filed a pro se writ of habeas corpus in federal district court. Sanders argued, among other things, that he had been denied due process because he had been coerced into waiving his right to appeal, and that he had received ineffective assistance of counsel. The magistrate judge issued findings and recommendations in 2001. The magistrate judge concluded that Sanders had properly exhausted his due process claims in state court, but that the state courts' determination of his claims was not contrary to, and did not involve an unreasonable application of, clearly established federal law. The magistrate judge also concluded that all of Sanders's other claims, including his ineffective assistance of counsel claims, were barred because he had failed to exhaust them in state court. The district court adopted the magistrate judge's recommendations and dismissed Sanders's petition. Sanders appealed.

II. Discussion

[1] A federal court may only grant a writ of habeas corpus with respect to a person incarcerated

pursuant to a state court judgment if "he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), and "has exhausted the remedies available in the courts of the State," *id.* § 2254(b)(1(A). To exhaust a federal claim in state court, a prisoner must "give state courts a *fair* opportunity to act on [his] claims." *O'Sullivan v. Boerckel,* 526 U.S. 838, 844, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (emphasis in original). Sanders argues that he exhausted his federal ineffective assistance of counsel claim by presenting it to the Washington State Supreme Court. We agree.

In his pro se brief to the Washington Court of Appeals, Sanders argued that he had received ineffective assistance of counsel. He explicitly cited the Sixth Amendment of the United States Constitution and *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the Supreme Court's central ruling on the federal right to effective assistance of counsel. In his first pro se petition to the Washington State Supreme Court, Sanders did not cite *Strickland* or the Sixth Amendment, but he used the phrase "ineffective assistance of counsel" three times. His petition did not explicitly identify whether his ineffective assistance claim was based on the federal constitution, the state constitution, or both. He did not cite any state or federal cases, but at the end of one of the three sentences in which he claimed ineffective assistance, Sanders did cite § 22 of Article 1 of the Washington Constitution, which is the Washington equivalent of the federal Sixth Amendment. Following the state's answer to his petition, Sanders filed a reply brief in the

Washington State Supreme Court in which he again argued ineffective assistance of counsel, this time explicitly citing the Sixth Amendment and *Strickland*.

Our recent en banc ruling in *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir. 2003) (en banc), which was issued after the district court's ruling below, controls our disposition of this case. In *Peterson* we found that the petitioner had failed to exhaust his federal ineffective assistance claim in state court. But under the analysis outlined in *Peterson* we believe that Sanders exhausted his federal ineffective assistance claim.

[2] First, *Peterson* makes clear that, for the purposes of exhaustion, pro se petitions are held to a more lenient standard than counseled petitions. *Id.* at 1159 ("[T]he complete exhaustion rule is not to trap the unwary pro se prisoner." (quoting *Slack v. McDaniel*, 529 U.S. 473, 487, 120 S.Ct 1595, 146 L.Ed.2d 542 (2000) (alteration in original))). We disavowed language by an earlier three-judge panel suggesting that pro se and counseled petitions should be read in the same way and held to the same standard. *Id.* Peterson's petition to the Oregon Supreme Court was counseled, but Sanders's petition to the Washington State Supreme Court was pro se.

[3] Second, *Peterson* makes clear that, depending on the context of his claim, a prisoner may alert a state court to the federal nature of the asserted right by using the phrase "ineffective assistance of counsel." Peterson had argued his federal ineffective assistance claim to the Oregon Court of Appeals, but in his petition to the Oregon Supreme Court he had only argued that he received

"*inadequate* assistance of counsel," *id.* at 1157 (emphasis added), and thus employed the phrase usually used to refer to the Oregon state constitutional right:

> Peterson's petition for review to the Oregon Supreme Court did not refer to his appellate court brief, did not mention any provision of the Federal Constitution, and did not mention "ineffective" assistance of counsel. Peterson could have fairly presented his federal claim in a number of ways, including (but not limited to) the ways just mentioned, but here he specifically and exclusively alleged a violation of his right to "adequate" assistance of counsel under the Oregon Constitution.

Id. By contrast, Sanders's petition consistently and exclusively "mention[ed] 'ineffective' assistance of counsel."

Third, *Peterson* did not decide whether a prisoner may exhaust a federal constitutional claim by referring to a state constitutional right when the contours of the federal and state constitutional rights are identical. In *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995), the Supreme Court held that a petitioner does not exhaust a federal claim by raising a state claim that is similar to the federal claim: "mere similarity of claims is insufficient to exhaust." A prisoner's vague claim in state court that his conviction was a "miscarriage of justice" was insufficient to alert the state court to an alleged violation of federal Due Process rights. *Id* at 364-65, 115 S.Ct. 887. But "[t]he Supreme Court in *Duncan* left open the question of what happens when the state and federal standards are not merely similar, but are, rather,

identical or functionally identical." *Peterson*, 319 F.3d at 1160.

[4] The right to effective assistance of counsel is identical under the United States Constitution and the Washington Constitution. The Washington State Supreme Court has explicitly held that the right to counsel under § 22 of Article I of the state Constitution is "coextensive" with the Sixth Amendment right to counsel. *State v. Long*, 104 Wash.2d 285, 705 P.2d 245, 246 (1985); *see also State v. Thomas*, 128 Wash.2d 553, 910 P.2d 475, 480 (1996) (rejecting a claim that § 22 provides different protections from the Sixth Amendment); *State v. Rivera*, 108 Wash.App 645, 32 P.3d 292, 294 n. 2 (2001) (same). When faced with ineffective assistance of counsel claims under both the federal and state constitutions, Washington courts analyze them both using the same *Strickland* test. *E.g., State v. Hendrickson*, 129 Wash.2d 61, 917 P.2d 563, 571 (1996), *State v. Mierz,* 127 Wash.2d 460, 901 P.2d 286, 291 (1995), *State v. Goodin*, 67 Wash.App. 623, 838 P.2d 135, 140 (1992). Indeed, it has become common-place for the Washington courts simply to refer to "ineffective assistance of counsel" claims--and to analyze them under the federal *Strickland* test--without specifying whether they are analyzing a state or federal right. *E.g., State v. Tilton*, 72 P.3d 735, 739 (Wash.2003), *In re Pers. Restraint of Tortorelli*, 149 Wash.2d, 66 P.3d 606, 612 (2003), *State v. McNeal*, 145 Wash.2d 352, 37 P.3d 280, 285 (2002), *State v. Cienfuegos*, 144 Wash.2d 222, 25 P.3d 1011, 1014-15 (2001), *State v. Bowerman*, 115 Wash.2d 794, 802 P.2d 116, 124 (1990). Sanders's first petition to the Washington State Supreme Court used the phrase "ineffective assistance of

counsel" three times. Although one of those three mentions was followed by a citation to § 22, there is nothing to suggest that Sanders--a pro se petitioner--meant to allege "specifically and exclusively" a violation of his state constitutional right. *Peterson*, 319 F.3d at 1157.

[5] Were there any remaining doubt about whether Sanders properly presented his federal claim, there is a fourth reason to distinguish this case from *Peterson*. Sanders's reply brief to the Washington State Supreme Court made clear that he meant to assert his federal constitutional right. In his reply brief, he explicitly cited the federal Sixth Amendment and the Supreme Court's ruling in *Strickland* His reply focused on his trial counsel's performance at sentencing while his initial petition focused on his trial counsel's performance before the verdict, but he was not thereby raising a new and different federal claim in his reply. When we examine whether trial counsel gave effective assistance, we examine all aspects of the counsel's performance at different stages, from pretrial proceedings through trial and sentencing. *United States v. Leonti*, 326 F.3d 1111, 1116-17 (9th Cir. 2003). Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. *See Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir. 1997), *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir, 1978). They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel. In Sanders's reply brief to the Washington State Supreme Court, he made it abundantly clear that his ineffective

assistance of trial counsel claim was a federal claim.

[6] For the foregoing reasons, we conclude that Sanders presented his federal ineffective assistance of counsel claim to the Washington State Supreme Court in such a manner that that court had a "*fair* opportunity" to address his claim. *O'Sullivan,* 526 U.S. at 844, 119 S.Ct. 1728. Sanders's federal ineffective assistance of counsel claim was therefore exhausted in state court. Because the district court ruled that Sanders's ineffective assistance claim was unexhausted, it did not conduct an evidentiary hearing and did not reach the merits of Sanders's claim. We remand to enable the district court to conduct an evidentiary hearing and reach the merits.

Because we hold that Sanders exhausted his federal ineffective assistance claim, we need not reach the issue of whether his claim of actual innocence would excuse a failure to exhaust. *See Schlup v. Delo,* 513 U.S. 298, 313-17, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Because other issues raised in Sanders's petition may depend in part on the resolution of his ineffective assistance claim, we decline to reach those issues at this time.

REVERSED and REMANDED.

[FILED]
[OCT. 15, 2003]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

DANIEL L. SANDERS,	)	No. 01-35675
	)	
Petitioner-Appellant,	)	DC. No.
	)	CV-00-05564-RJB
v.	)	
	)	ORDER
LESLIE RYDER,	)	
	)	
Respondent-Appellee.	)	

Before : REINHARDT, W. FLETCHER, and GOULD, Circuit Judges

The panel has voted to deny the petition for rehearing and to deny the petition en banc, filed September 18, 2003.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL L. SANDERS,	)	Case No. C00-5564RJB
	)	
Petitioner,	)	JUDGMENT IN A
v.	)	CIVIL CASE
	)	
LESLIE W. RYDER,	)	
	)	
Respondent.	)	
	)	

_____ Jury Verdict. This action came before the Court for a trial by jury. This issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Court adopts the Report and Recommendation. Petitioner's Petition under 28 USC 2254 for Writ of Habeas Corpus by Person in State Custody is denied.

May 30, 2001

BRUCE RIFKIN
Clerk

/s/ Eileen Castellente
By Eileen Castellente,
Deputy Clerk

[FILED]
[MAY 30, 2001]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL L. SANDERS,	)	Case No. C00-5564RJB
	)	
Petitioner,	)	ORDER ADOPTING
v.	)	REPORT AND
	)	RECOMMENDATION
LESLIE W. RYDER,	)	AND DENYING
	)	PETITION FOR
Respondent.	)	WRIT OF HABEAS
	)	CORPUS

This matter comes before the court on petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Dkt. #5). The court has carefully considered the petition, the Report and Recommendation of Magistrate Judge J. Kelley Arnold (Dkt. #25), petitioner's Motion of Objection to Report and Recommendation and Request for Consideration of Mr. Sanders' Response Brief (Dkt. #28), Petitioner's Response to Answer, Memorandum of Authorities, and Affidavit of Daniel L. Sanders (Dkt. #27), and the file herein.

Petitioner seeks federal habeas relief under 28 U.S.C. § 2254, challenging his 1997 conviction

for Child Molestation in the First Degree. After reviewing the record, the Magistrate Judge recommended that the court deny Mr. Sanders' petition for writ of habeas corpus on the grounds that 1) "[t]he state court of appeals' decision to deny petitioner's due process claims was not contrary to federal law nor based on an unreasonable determination of the facts" and 2) "Mr. Sanders failed to properly exhaust the [other] issues raised in his petition and is now procedurally barred from having those claims considered." Report and Recommendation, pp. 5, 3 (Dkt. #25). For the reasons stated in the Report and Recommendation (Dkt. #25), the court concurs that the petition for writ of habeas corpus should be denied.

Therefore, it is hereby

ORDERED that the Report and Recommendation (Dkt. #25) is **ADOPTED**, and petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Dkt. #5) is **DENIED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 30 day of May, 2001.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

[FILED]
[MARCH 13, 2001]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL L. SANDERS,	)	Case No. C00-5564RJB
	)	
Petitioner,	)	REPORT AND
v.	)	RECOMMENDATION
	)	
LESLIE W. RYDER,	)	
	)	
Respondent.	)	
	)	

This case has been referred to United States Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(A) and 636(b)(1)(B), and Local Magistrates rule MJR3 and MJR4. Petitioner, a state prisoner proceeding in forma pauperis, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of June 4, 1997, Patti Sue Kelly, who is the mother of Mr. Sander's fourteen year old son, slept while Mr. Sanders was left alone to care for her three-year old son, Tyler. Based on statements made by the three year old child to Ms. Kelly, during this morning time period Mr. Sanders

performed some sexually offensive acts with the child. Petitioner was subsequently charged and found guilty by a jury of his peers of Child Molestation in the First Degree.

Prior to sentencing, Mr. Sanders considered waiving his right to appeal in exchange for the State not filing a variety of additional charges and a waiver of the State's right to seek an exceptional sentence. At a open court hearing on October 2, 1997, the trial court considered this issue. The transcript of the hearing shows that the stipulated agreement was read into the record, at which time Mr. Sanders interjected that he believed that there had been threats or promises outside the terms of the agreement. The court asked petitioner about his concerns and a long colloquy transpired between defendant, defendant's counsel, the prosecutor and the court discussing the contents and meaning of the stipulation. The trial judge found that Mr. Sanders freely and voluntarily, with knowledge, signed the agreement waiving his right to an appeal. Mr. Sanders was consequently sentenced to 108 months of imprisonment by the judge, as recommended in the stipulation. See Exhibit 17.

Approximately three weeks later, Mr. Sanders filed a Notice of Appeal and challenged the trial court's finding that he had effectively waived his right to an appeal. Exhibit 3 & 4. The State Court of Appeals affirmed the trial judge's decision, and on April 29, 1999, Mr. Sanders filed a Petition for Review with the Washington Supreme Court. In his petition for review, Mr. Sanders raised the following three issues:

1. The trial court erred in exercising its discretion in accepting the waiver of the defendant's right to appeal, since the waiver was not knowingly, intelligently, voluntarily made, and the defendant was not informed of the direct consequences or of his constitutional rights regarding his right to appeal.

2. Mr. Sanders waiver of the right to appeal was the product of vindictive prosecution, induced by excessive coercion, threat, and fear.

3. The trial court erred in denying Mr. Sanders motion to withdraw his waiver of the right to appeal, since this waiver was the product of prosecutorial vindictiveness and Mr. Sanders was under extreme duress from being maliciously threatened into singing the waiver of appeal.

Exhibit 10. The Washington State Supreme Court denied the petition on August 31, 1999.

Now, petitioner is before the federal court asking for a writ of habeas corpus. In the instant petition, Mr. Sanders raises the following nine issues related to his conviction and sentence:

i. Denial of the Constitutional right to effective assistance of trial counsel

ii. Conviction obtained in violation of the Constitutional right to a fast and speedy trial

iii. Conviction obtained on insufficient evidence to convict

iv. The petitioner was maliciously threatened with fabricated erroneous charges and was unlawfully induced by coercion into signing the waiver of the right to appeal, and prosecutorial misconduct CrR 8.3

v. The signing of the waiver of the right to appeal was not made knowingly, intelligently, or voluntarily, or with the understanding of the Constitutional rights that were being waived, which is required by law

vi. The trial court judge's involvement in the signing of this waiver of the right to appeal was coercive, leaving the petitioner with no other choice but to sign this waiver

vii. Ineffective assistance of retained counsel during the October 2, 1997 hearing, regarding the signing of the waiver of the right to appeal

viii. Conflict of interest, and prohibition against the trial court prosecutor

ix. Ineffective assistance of appellant counsel

Petitioner (Dkt. #5).

After considering the petition and reviewing the record, this court recommends that Court deny the petition for writ of habeas corpus.

DISCUSSION

A. *MR. SANDERS FAILED TO PROPERLY EXHAUST THE ISSUES RAISED IN HIS PETITION AND IS NOW PROCEDURALLY BARRED FROM HAVING THOSE CLAIMS CONSIDERED*

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. §2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent. 28 U.S.C. §2254(b)(3). A petition can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir.), *cert. denied*, 478 U.S. 1021 (1986). Full and fair presentation of claims to the state court requires "full factual development" of the claims in that forum. *Kenney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). Vague references to broad constitutional principles such as due process, equal protection and a fair trial do not satisfy the exhaustion requirement. *Gray v. Netherland*, 518 U.S. 152, 12 (1996); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." *Gray*, 518 U.S. at 163.

Respondent argues, "Mr. Sanders failed to fairly present all of his habeas claims to the Washington Supreme Court. *See* Exhibit 10. In Exhibit 10, Mr. Sanders' petition for review, he

presented his fourth, fifth, sixth and seventh habeas claims, but failed to present any of those claims as specific federal constitutional violations. *Id.*" Answer at 13. After thoroughly reviewing Mr. Sanders' petition for review and comparing the arguments made therein to the nine issues presented for habeas relief, this court disagrees.

A review of the petition for review filed with the Washington State Supreme Court shows Mr. Sanders fairly presented a federal due process issue in his petition for review. Petitioner argued, "The Fed. Rules Crim. Prac. Rule 11, 18 U.S.C.A., CrR 4.2, and Due Process requires that a plea of guilty must be entered knowingly, voluntarily, freely, intelligently and understandingly made in open court by the accused person, and the trial court must exercise extreme care to ensure that the accused person has full knowledge of his legal and Constitutional rights and the consequences of his acts." Petitioner further argued that the waiver of the right of appeal is reviewed under the same standard. Mr. Sanders also fairly presented the issue of a due process violation related to his waiver of his right to appeal caused by the alleged threats or intimidation of the prosecutor. The due process issue – whether or not Mr. Sanders properly waived his right to appeal his conviction and sentence – is the only issue that has been properly exhausted. Petitioner's other claims were either not raised at all or raised in a rebuttal or responsive brief, which would not allow the issue to be fully developed and is procedurally defective.

Significantly, habeas claims are barred from federal review where the petitioner has failed to exhaust state remedies and the state's highest court

would now find the claim to be procedurally barred. *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991). The United States Supreme Court has recognized that when a petitioner has defaulted on his claims in state court, principles of federalism, comity, and the orderly administration of criminal justice require that federal courts forego the exercise of their habeas corpus power. *Francis v. Henderson,* 425 U.S. 356, 538-39 (1976). Rules that promote the prompt resolution of all constitutional claims at the appropriate state court proceeding must be represented by a federal habeas court. *Coleman v. Thompson*, 501 U.S. 722 (1991).

In this case, If Mr. Sanders attempted to present his unexhausted claims to the Washington State Supreme Court, they would be rejected as untimely. The relevant state statute provides: "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." Wash. Rev. Code § 10.73.090. Mr. Sanders' judgment became final on September 21, 1999, and therefore, any attempt now to present his claims would be time barred by the state courts.

Federal habeas review of an unexhausted procedurally barred claim is denied, unless petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *See Coleman*, 111 S. Ct. 2546, 2565 (1991) (emphasis added). To satisfy the "cause" prong of the cause and prejudice standard, petitioner must show

that some objective factor external to the defense prevented him from complying with the state's procedural rule. *Id.* at 266 (*citing Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "Prejudice" exists if the alleged errors were of constitutional dimensions and worked to the defendant's "actual and substantial disadvantage." *United States v. Fray*, 456 U.S. 152, 170 (1982). Alternatively, in an "extraordinary case" the habeas court may grant the writ without a showing of cause and prejudice to correct a "fundamental miscarriage of justice" if petitioner can show that his conviction is the result of a constitutional violation and that he is actually innocent. *Murray*, 477 U.S. at 495-96.

Here, petitioner has not demonstrated cause and actual prejudice for the procedural bar that would be imposed if he now attempted to exhaust his chain of custody issue. Moreover, petitioner has not shown that this matter is an extraordinary case in which the federal court must grant the great writ to correct a fundamental miscarriage of justice. The court should not consider the unexhausted claims presented by Mr. Sanders in his petition for writ of habeas corpus.

B. THE STATE COURT OF APPEALS'S DECISION TO DENY PETITIONER'S DUE PROCESS CLAIMS WAS NOT CONTRARY TO FEDERAL LAW NOR BASED ON AN UNREASONABLE DETERMINATON OF THE FACTS

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. *Engle v. Isaac*, 456 U.S. 107 (1983). Section 2254 is explicit in that a federal

court may entertain an application for writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States." 28 U.S.C. § 2254(a)(1995). The Supreme court has stated many times that federal habeas corpus relief does not lie for mere errors of state law. *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Estelle v. McGuire*, 502 U.S. 62 (1991).

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C.§2254(d). Further, a determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

When the State Court of Appeals addressed the issue of Mr. Sanders' waiver of his right to appeals, it thoroughly reviewed the transcript of the relevant hearing and the trail record and wrote:

> Washington Const. art. 1, § 22 grants a right of appeal to all criminal defendants. There is no presumption in favor of waiver of the right of appeal, and the State has the burden of demonstrating that a convicted defendant made a voluntary, knowing, and intelligent waiver of this right. *State v. Sweet*,

90 Wn.2d 292, 286, 581 P.2d 579 (1978). Waiver is the intentional relinquishment or abandonment of a known right or privilege. *Sweet*, 90 Wn.2d at 286 (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938), and *Sate v. Schoel*, 4 Wn.2d 388, 341 P.2d 481 (1959)). The law is clear that a defendant can waive his or her right of appeal in exchange for the dismissal of certain charges or a favorable sentencing recommendation by the prosecutor or both. *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). *Accord State v. Lee*, 132 Wn.2d 498, 505-06, 939 P.2d 1223 (1997).

[Omitted]

We hold that the waiver by Sanders was knowing, intelligent, and voluntary. Sanders was well acquainted with the criminal justice system. He said more than once that he wanted to appeal the conviction, but he wanted on the other hand to take advantage of the prosecutor's lenient sentencing offer and to avoid the prospect of additional charges. He had the active assistance of counsel, who reminded him that nobody was forcing him to decide either way, and the decision was entirely his. Sanders was aware of the realities of sentencing, i.e., the court did not have to follow the State's recommendation, but usually does, and the probation officer might make a different recommendation. The judge took great pains to make sure that Sanders was signing the stipulation freely and voluntarily, having elected to waive the right of appeal rather than face the prospect of an

> exceptional sentence and additional charges. The trial court correctly denied Sanders's motion to withdraw the stipulation.

Exhibit 9.

The state court's standard of review of a waiver of Mr. Sander's [sic] state constitutional right to appeal is similar to the federal inquiry. First of all, the court notes there is no federal constitutional right to appeal. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983). Nonetheless, the federal court regularly enforces "knowing and voluntary" waivers of appellate rights in criminal cases, provided that the waivers are part of negotiated guilty pleas, *see United States v. Michlin*, 34 F.3d 896, 898 (9th Cir. 1994). When determining if a particular waiver was made "knowingly and voluntarily" the federal court looks to the circumstances surrounding the signing and entry of the plea agreement. *See United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). Also relevant is whether the trial court informed the defendant of her appellate rights and verified her intent to forfeit them. *See United States v. Novarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); but see *Michlin*, 34 F.3d at 898 (holding that a plea colloquy pursuant to Federal rule of Criminal Procedure 11 is not a prerequisite for a valid waiver of appellate rights when a plea agreement expressly waives the appellate rights).

After reviewing the record, this court finds the state court applied an appropriate standard and did not unreasonably apply the facts of this case to that standard.

CONCLUSION

Based on the foregoing discussion, the Court should deny the petition for writ of habeas corpus. A proposed order accompanies this report and recommendation.

DATED this 13th day of March, 2001.

/s/ J. Kelley Arnold
J. Kelley Arnold
United States Magistrate Judge